

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of )  
 )  
Implementation of Section 22 )  
of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992: )  
Equal Employment Opportunities )  
 )  
Petition of the NAACP, and Request )  
of the Office of Communication of )  
the United Church of Christ, for )  
Further Rulemaking on Equal )  
Employment Opportunities in Cable )  
Television and Broadcasting )

MM Docket No. 92-261

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO THE COMMISSION

**PETITION FOR RECONSIDERATION OF  
THE NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE AND  
THE OFFICE OF COMMUNICATION OF  
THE UNITED CHURCH OF CHRIST**

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**SUMMARY**

The Cable EEO Report and Order contains serious errors of law and misreadings of Congressional intent. A petition for reconsideration is the proper means to seek correction of these errors.

Congress intended the EEO provisions of the Cable Act as a remedy for the insufficiency of the Commission's previous EEO regulatory program. While barring most changes in the language of the television EEO Rule and associated forms, Congress did not bar technical or "nonsubstantive" changes. 47 U.S.C. §334(a) and (c). Thus, the Commission is free to develop specialized forms to facilitate its enforcement of EEO in television, and it has unfettered discretion to expand its enforcement of EEO in radio.

The Report and Order found that when Congress directed a midterm review of the "employment practices" of television stations (47 U.S.C. §334(b)) and directed the Commission to provide errant licensees with letters on how to improve their "recruitment practices" (Conference Report, 1992 U.S. Cong. and Admin. News 1231, 1279) Congress really intended that review to encompass only statistical evidence, and not evidence of the EEO efforts themselves. Not only does this reading disregard the plain meaning of the statute, it presumes that Congress intended to overrule the holdings of Broadcast EEO, 2 FCC Rcd 2967 (1987) that EEO compliance is not merely a numbers game, and that review of EEO efforts is the centerpiece of EEO enforcement.

The Commission should also reconsider its finding that EEO requirements should not apply to the video dialtone service. Video dialtone is not just a "platform" for multichannel programming, since telephone companies will be intimately involved as producers and editors of videotex programming. Yet even if telephone companies played no editorial role whatsoever, there is no logical reason to exclude what ultimately may be the nation's largest distributor of program content from EEO jurisdiction. The dividing line between mass media and telecommunications job markets is becoming quite blurry, with students and trainees crossfertilizing both. Thus, EEO requirements for video dialtone would do much to foster diversity. Without EEO regulation, video dialtone providers could become a serious impediment to EEO in traditional mass media and thus a serious threat to diversity.

While diversity is an important rationale for EEO regulation in telecommunications, it is not the only one. The Commission historically has been intimately involved in the acceptance and endorsement of discrimination by its licensees. It has rewarded de jure discriminators such as colleges and universities with valuable broadcast permits. For years, the Commission was a discriminator itself. It has never taken steps to remedy the present effects of this past discrimination. It can begin to do so now by applying EEO regulation to evolving telecommunications technologies.

Finally, the Commission has expressly refused to grant NAACP's and UCC's requests for assignment of "RM" numbers to those portions of the NAACP and UCC comments which the Commission believes to be beyond the scope of this proceeding. The Commission has absolutely no authority to refuse these requests and deny due

process by pocket veto. 47 CFR §1.403; 5 U.S.C. §553(e), §555(b) and §706(1). Its refusals to even allow the processing line to commence for these and three other minority interest rulemaking proposals are inexplicable and rather unseemly. The Commission should promptly assign the NAACP and UCC proposals the "RM" numbers to which they are absolutely entitled.

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TO THE COMMISSION

**PETITION FOR RECONSIDERATION OF  
THE NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE AND  
THE OFFICE OF COMMUNICATION OF  
THE UNITED CHURCH OF CHRIST**

The National Association for the Advancement of Colored People ("NAACP") and the Office of Communication of the United Church of Christ ("UCC") respectfully seek reconsideration of the Report and Order in Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-261, FCC 93-334 (released July 23, 1993). All matters in the NAACP and UCC comments in this proceeding which are not expressly addressed herein are expressly preserved for appeal.

**I. JURISDICTIONAL BASIS FOR RECONSIDERATION**

This Petition for Reconsideration is presented pursuant to 47 CFR §1.106(d), which contemplates reconsideration where there are significant "findings of fact and/or conclusions of law which petitioner believes to be erroneous[.]" While a petition for reconsideration may not reargue matters already decided, it may present questions of law upon which the Commission has had no

previous opportunity to pass; indeed, presenting such questions in a petition for reconsideration is a necessary condition precedent to judicial review. See 47 CFR §1.106(m). Moreover, economy of adjudicative resources is advanced when participants in rulemaking proceedings afford an agency an opportunity to correct its errors before a court of appeals is asked to step in.

Therefore, rather than proceed directly to court, the NAACP and the Office of Communication are seeking review of some portions of the Report and Order which contain clearly erroneous statements of law.

**II. THE CABLE ACT DOES NOT PROHIBIT FINE-TUNING OF BROADCAST EEO ENFORCEMENT**

NAACP's comments contained several suggestions to revise or to expand the use of Form 396 and Form 395-B. Based on its experience in reviewing hundreds of these forms every year, the NAACP identified several means of eliminating loopholes and enabling the Commission to better understand an applicant's EEO performance and proposals.

The Commission summarily rejected all of the NAACP proposals, holding:

The 1992 Cable Act explicitly prohibits revisions to these forms and the broadcast EEO Rule as they apply to broadcast television stations.

Report and Order at 5 n. 16, citing 47 U.S.C. §334(a) and House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992), reprinted at Cong. Rec. H 8308, H 8333 (daily ed. September 14, 1992) ("Conference Report").

The limitations imposed by §334(a), applicable to all television licensees, are not as sweeping as the Report and Order suggests, for five reasons.

First, 47 U.S.C. §334(c) modifies §334(a) to allow modifications which do not create new law. Section 334(c) provides:

The Commission may revise its regulations described in [47 U.S.C. §334(a)] to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization.

Section 334(c) should be broadly construed in light of the remedial purpose of the statute. The Conference Report found that

(a) Findings. The Congress finds and declares that -

(1) despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;

(2) increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media; and

(3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.

Pub. L. 102-385, Section 22(a). In light of these findings that past regulatory initiatives were insufficient to remedy the lack of equal opportunity in television, no needlessly narrow reading should be assigned to Section 334(c).

Section 334(c) clearly permits many of the revisions proposed by the NAACP. The NAACP's proposal to revise Form 395-B to include data on p. 29 n. 8 (proposing revision of Form 395-B to include data on group owners, including owners of three and four



station local radio duopolies; see NAACP Comments at 29 n. 8) simply applies the preexisting requirement that co-owned facilities in the same market must file a combined EEO report. That requirement prevented licensees from filing separate Form 395s for their co-situated AM and FM stations, a tactic formerly used to disguise or minimize EEO noncompliance. Extending this well established requirement to larger duopolies would thus be technical and nonsubstantive within the meaning of §334(c).

Similarly, the NAACP's proposal to require proof that affirmative recruitment efforts were undertaken for each job vacancy is nonsubstantive within the meaning of §334(c). Virtually every Commission EEO decision embodies the holding that the affirmative requirement provision of the EEO Rule is triggered for every job vacancy. See NAACP Comments at 16. Thus, no new substantive law would be created by making a technical revision to Form 396 (or its instructions) to formally state this requirement. Indeed, placing the requirement in the form would assist licensees to become familiar with what is expected of them, thereby eliminating much of the need for case by case adjudication and conserving resources better applied to cases of more deliberate noncompliance.

Second, Section 334(c) does not bar the creation of specialized reporting forms which would facilitate EEO enforcement, so long as they are not applicable to all television licensees (as are Form 395-B and Form 396). Thus, a more detailed report, intended to facilitate the processing of renewal applications, might be developed to be sent to the fraction of television stations whose EEO profiles or rates of minority or female hiring have repeatedly fallen well below parity with the protected group's

representation in the workforce. Such a form would seek information of lesser depth than an investigation under Bilingual Bicultural Coalition v. FCC, 595 F.2d 621 (D.C. Cir. 1978) and would not substitute for such investigations in instances in which they are now performed. This form would be effective in focusing EEO enforcement resources on the approximately 20-30% of licensees which might not be the subject of a petition to deny but whose EEO records leave much to be desired. The new form might include many of the points initially recommended by the NAACP, including proof that minority-sensitive sources were contacted for each job vacancy and a specification of what kind of contact is made with recruitment sources (e.g. annual form letter; occasional telephone call; personal contact triggered by job vacancy.) See NAACP Comments at 17. Indeed, such a procedure would facilitate Congress' intention of Congress that television licensees not meeting the EEO processing guidelines should be sent "a staff letter...so indicating." Conference Report, No. 102-862, 1992 U.S. Cong. and Admin. News 1231, 1279.

Third, Section 334(a) does not limit the Commission's discretion to send a compliance form to entities other than the renewal applicant. Section 334(a) only limits the Commission's discretion in changing the rule and the wording of the forms themselves. Thus, recognizing that EEO violations often appear companywide,<sup>1/</sup> the Commission may require an informational Form 396 to be filed by a licensee's headquarters and its co-owned facilities in other communities in appropriate cases. See NAACP Comments at 18, 27-30.

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<sup>1/</sup> See, e.g., Heritage Broadcasting - Wisconsin, FCC 93-360 (released August 2, 1993) (admonishments or sanctions issued against commonly owned stations in three cities).

Fourth. Section 334(a) does not prohibit the Commission from adopting equal opportunity proposals which do not directly relate to equal employment. Thus, nothing bars the Commission from encouraging broadcast stations to use minority and female suppliers. See NAACP Comments at 18. Such a provision is codified at 47 U.S.C. §554(d)(2)(E) for cable, but no such provision applies to broadcasters. Since this provision does not directly relate to equal employment, it appears to be codified at §554 of the Act for convenience. By preferring substance to form, the Commission may take the cable language in §554(d)(2)(E) and place it into a new minority and female entrepreneurship rule applicable to broadcasters. In this way, the Commission may correct the irrational anomaly whereby cable systems but not broadcasters are encouraged to use minority and female suppliers.

Fifth. Section 334 does not apply to radio. Radio stations are the primary source of EEO noncompliance. As the principal entry point for minorities in mass media, EEO compliance in radio is critical to effectuation of EEO in television and other mass media. Thus, the NPRM is broad enough to encompass consideration of radio EEO.<sup>2/</sup> The Commission should revisit the NAACP's proposals insofar as they apply to radio.<sup>3/</sup>

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<sup>2/</sup> See Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 Rad. Reg. 2d (P&F) 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987) (although NPRM only related to Docket 80-90 FMs, the extension of Docket 80-90 FM filing rules to non-Docket 80-90 FMs was consistent with the notice and comment requirements of §553 of the APA.)

<sup>3/</sup> If the Commission deems radio to be outside the scope of this proceeding, it should treat the NAACP's radio EEO proposals as a petition for rulemaking. See pp. 11-18 infra.

III. **MIDTERM EEO REVIEW CANNOT BE LIMITED  
TO STATISTICAL PERFORMANCE**

The Report and Order sends mixed and confusing signals to broadcasters on the Commission's test for EEO compliance. These signals can be harmonized by an express holding, on reconsideration, that efforts as well as numbers define a licensee's compliance with the EEO Rule, now codified in the Act. That holding can only be given vitality by conducting a midterm review of licensees' efforts, not just their numbers.

The Commission has repeatedly emphasized that its EEO regulatory review focuses primarily on efforts, not statistics. Broadcast EEO, 2 FCC Rcd 3967 (1987). In practice, however, the presence of some statistical representation of minorities is enough to merit renewal, even if virtually no efforts were undertaken. See, e.g., KBIL-FM, 7 FCC Rcd 5292, 5293 ¶11 (1992). On the other hand, the Commission has historically found some "efforts" sufficient to mitigate almost any statistical record, no matter how abysmal. South Carolina Renewals, 5 FCC Rcd 1704, 1708 ¶38 (1990) (subsequent history omitted); Woolfson Broadcasting Corp., 4 FCC Rcd 6160 (1989).

The Report and Order concludes that meaningful EEO scrutiny can be provided at midterm in a TV renewal cycle with statistics alone. Id. at ¶¶7-9. It reaches this surprising conclusion by equating statistics with the words "broadcast television station's employment practices" in the Cable Act, 47 U.S.C. §334(b). To reach this conclusion, the Commission relied on the Conference Report's statement that a statistical comparison should be employed. Report and Order at 9, citing Conference Report at H 8333-8334.

However, the Conference Report only stated the form which that analysis was to take.<sup>4/</sup> Underscoring the conferees' view that statistics alone do not describe a "broadcast television station's employment practices," the Conference Report added after describing the statistical test that

[t]his review is not intended to establish and shall not be considered or utilized in any manner as establishing a quota....[i]f this staff level review suggests that improvement in the station's recruitment practices appears necessary, a staff letter shall be sent to the station licensee so indicating [emphasis supplied].

Conference Report, 1992 Cong. and Admin. News 1231, 1279. Thus, the conferees correctly recognized that the Commission must ask for more than statistics. They wanted the Commission to collect the information normally gathered to evaluate recruitment practices, which includes statistics and EEO efforts. They simply found it necessary to specify which statistics shall be sought -- an understandable clarification in order to avoid confusion on this point. Nothing in the Conference Report or the Cable Act states that only statistics shall be sought, or that "employment practices" can somehow be divined from a reading of statistics unaccompanied by evidence of the practices themselves. Congress apparently assumed that the Commission would understand that the plain meaning of the word "practices" means deeds, not just numbers. Indeed, a holding equating numbers with practices would

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<sup>4/</sup> The Conference Report expresses the "intent of the conferees" that the Commission's staff should "compare the workforce data...applying the FCC EEO processing guidelines[.]" 1992 U.S. Cong. and Admin. News 1231, 1279. That is language of instruction, not language of limitation.

have expressly overruled Broadcast EEO, 2 FCC Rcd 3697, 3973-3974 ¶¶44-50 (1987), which held that efforts, not numbers alone, are the earmark of a successful EEO program. Congress intended no such extreme result. To evaluate broadcasters' "employment practices" at midterm, as required by the Cable Act, the Commission should ask for information about those practices as well as the statistical data expressly described in the Conference Report.

IV. EEO REQUIREMENTS SHOULD APPLY  
TO THE VIDEO DIALTONE SERVICE

Holding that video dialtone providers are merely a platform for multichannel programming,<sup>5/</sup> the Report and Order elected not to apply EEO requirements to such providers. Report and Order, ¶46. The Report and Order correctly omitted any suggestion that Congress affirmatively intended that the EEO requirements not apply to video dialtone providers. Id., ¶45. However, the Report and Order expressed the view that Congress had "apparently" determined that entities which "exercise selection control over video programming provided directly to the consumer, have the greatest and most direct effect on the programming choices offered to the American public." Id.

The Report and Order apparently takes the position that Congress has left the choice to regulate or abstain from regulation up to the Commission. While that position is debatable,<sup>6/</sup> NAACP and UCC will assume it to be correct for the purpose of this petition for reconsideration.

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<sup>5/</sup> That holding is erroneous, since as providers of videotex news service, telephone companies will be intimately involved in the selection and editing of media content.

<sup>6/</sup> See Letter from Congresswoman Cardiss Collins to Chairman James H. Quello, April 15, 1993.

Unless reversed, the Commission's choice to abstain from EEO regulation of video dialtone will seriously depress minority employment opportunity in the emerging technologies. The markets for employees in mass media and telecommunications are evolving into one unified employment market. Mass communications students are as likely to find employment in cable as in broadcasting, in telephony as in traditional mass media. Those trained in one industry often use their training to crossfertilize another.<sup>1/</sup>

Thus, even if short term diversity is promoted directly only by traditional mass media, long term diversity is promoted by EEO requirements applicable to all communications technologies. The telephone industry employs approximately ten times as many persons as do the broadcasting or cable industries. Thus, EEO requirements for each industry would do much to foster diversity. A huge telecommunications segment without EEO regulation could become a serious impediment to EEO in traditional mass media and thus a serious threat to diversity.

The fact that diversity might be only indirectly advanced by EEO in video dialtone is no reason not to require it. Indeed, most jobs in video dialtone, cable, and even broadcasting will not or do not directly involve the selection of programming. However, even if no jobs in telephony ever directly involved program selection, the industry's enormous potential size and importance

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<sup>1/</sup> This illustrates why the decision to regulate video dialtone EEO is not controlled by the decision not to require retransmission consent for video dialtone. Report and Order 142; see Report and Order in MM Docket No. 92-259, 8 FCC Rcd 2965, 2998 (1993). The relevant markets for retransmission consent are relatively discrete corporate universes -- video suppliers and telephone companies. However, the relevant markets for mass media and telecommunications employment are hardly discrete; indeed, they are swiftly uniting.

and its crossfertilization of ownership and employment in traditional mass media make EEO regulation of such technologies as video dialtone a very cost-effective way to promote diversity.

Furthermore, diversity should not be the sole rationale for EEO regulation. Diversity had little to do with the Commission's adoption of the (seldom enforced) Common Carrier EEO Rules. See Common Carrier Report and Order, 24 FCC2d 725 (1970). As pointed out in the NAACP's Comments at 2-15, until perhaps the mid-1970s the Commission was knee-deep in the acceptance and endorsement of its licensee's openly discriminatory practices, going so far as to bestow several valuable broadcast permits on de jure segregated colleges and universities. For years, the Commission was a discriminator itself; until the mid-1960s, virtually no minorities worked in nonmenial capacities at the Commission, and no minority person served on the Commission until 1972. The Commission has a long-delayed obligation to rectify the present effects of its own past involvement in and official sanctioning of discrimination, not to mention its own discriminatory behavior. One way to do this is to insure that tomorrow's technologies are fully integrated from Day One of their existence. It is unfortunate that the agency is not seizing upon the existence of video dialtone as an opportunity to inject equal opportunity into the telecommunications industry. On reconsideration, the Commission should reverse the policy announced in the Report and Order and either extend the EEO requirements in the Cable Act to video dialtone providers or open a further notice of proposed rulemaking aimed at developing a separate EEO rule applicable to video dialtone.



V. **THE COMMISSION LACKS JURISDICTION  
TO REFUSE TO STAMP IN A RULEMAKING  
PETITION WITH AN "RM" NUMBER**

The NPRM in this proceeding expansively sought comment on all aspects of the Commission's EEO enforcement program. It "encourage[d] the parties to submit comments with respect to any other sections of the [Cable] Act that they believe may affect the Commission's EEO rules and regulations."

NAACP and UCC each filed comprehensive proposals to reform the Commission's EEO enforcement program and thus implement the Cable Act's EEO provisions. However, recognizing that the NPRM had not precisely delineated the scope of the proceeding, NAACP and UCC each asked that any of their proposals which might be deemed to be beyond the scope of the proceeding be treated as a petition for rulemaking.

The Administrative Procedure Act authorizes petitions for rulemaking to be filed by nongovernmental entities such as NAACP and UCC. 5 U.S.C. §553(e) ("[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.") The Commission's implementing rules contain virtually identical language. 47 CFR §1.401(a).<sup>8/</sup> The Commission's Rules, 47 CFR §1.403, also provide as follows:

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<sup>8/</sup> Section 1.401 of the Rules also contain threshold acceptability requirements for petition for rulemaking (that they set out the substance of the rules sought; identify how petitioner's interest will be affected; and that they not be moot, frivolous or repetitive). The Report and Order correctly does not hold that either NAACP or UCC failed to meet any of these requirements.

All petitions for rule making (other than petitions to amend the FM , Television, and Air-Ground Tables of Assignments) meeting the requirements of §1.401 will be given a file number and, promptly thereafter, a "Public Notice" will be issued (by means of a Commission release entitled "Petition for Rule Making Filed") as to the petition, file number, nature of the proposal, and date of filing[.]

The file number (colloquially known as an "RM number") referred to in §1.403 is a condition precedent to further consideration of a rulemaking proposal, either by other interested parties or by the Commission itself. 47 CFR §1.405 and §1.407. Ultimately, after considering the comments of other parties, a petition for rulemaking may be denied, but if it is denied, "the petitioner will be notified of the Commission's action with the grounds therefor." 47 CFR §1.407.

The Administrative Procedure Act directs agencies to conclude matters presented to them "within a reasonable time," 5 U.S.C. §555(b) and stipulates that reviewing courts shall "compel agency action unlawfully withheld or unreasonably delayed...." 5 U.S.C. §706(1). See Public Citizen Research Group v. FDA, 740 F.2d 21, 32 (D.C. Cir. 1984). These APA requirements give life to Congress' intention that "the benefits of agency expertise and creation of a record will not be realized if the agency never takes action." TRAC v. FCC, 750 F.2d 70, 789 (D.C. Cir. 1984).

As shown above, neither the APA nor the Commission's rules contemplate a "pocket veto" of a petition for rulemaking. Yet that is exactly what the Commission has done to NAACP and UCC's proposals. The Commission's reaction could not have been more inconsistent with the express requirements of the APA and Section §1.403 of its Rules. The Report and Order, ¶50, held:

The scope of this rulemaking proceeding is limited only to the specific EEO provisions of the Cable Act of 1992. The requests from...NAACP and UCC are unrelated to the specific EEO provisions of the Cable Act of 1992 and are, therefore, beyond the scope of this proceeding. 158/ Accordingly, we will not consider these requests herein. 159/

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158/ We have considered the suggestions from NAACP and UCC to the extent that they relate to the specific EEO provisions of the Cable Act of 1992.

159/ The Commission may consider these suggestions at a later time. Section 22(g) of the 1992 Cable Act requires the Commission, within two years of the date of the statute's enactment, to present a report to Congress regarding its EEO enforcement proposal for both the broadcast and cable industries. See Section 22(g) of the 1992 Cable Act.

No staff shortage or other exigencies excuse the Commission's failure to stamp in the NAACP and UCC proposals with an "RM" number. Compliance with §1.403 of the rules is a ministerial act normally requiring only a few weeks of processing delay and the issuance of a one or two sentence public release.<sup>2/</sup> Such an act commits the Commission to no substantive position, although failure to perform that act sends rulemaking proposals to a certain death because the conditions precedent to final review under §1.407 of the rule can never occur without the "RM" number.

NAACP and UCC acknowledge that §1.403 does not say how much time may elapse between the filing of a petition for rulemaking and the issuance of an "RM" number. However, a statement such as that

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<sup>2/</sup> A 1992 analysis by the NAACP found that RM numbers are typically assigned within about 45 days of the filing of petitions for rulemaking.

in the Report and Order, to the effect that an agency "may consider" a petitioner's proposals in two years is tantamount to an unauthorized pocket veto.

A comparison of this case with TRAC, supra, is instructive. In TRAC, the D.C. Circuit relied on the FCC's assurances that it was moving expeditiously to resolve citizen complaints of excessive common carrier charges. The court held that four and five year delays "clearly warrant retaining jurisdiction" without deciding whether these delays justified mandamus. 750 F.2d at 80-81. In the instant case, the Commission has not promised ever to reach the NAACP and UCC proposals, nor has it even started the record moving by performing the ministerial act of assigning those proposals "RM" numbers.

The fair employment opportunities at issue here are even more critical to the public interest than the essentially economic issues argued in TRAC. See Public Citizen Health Research Group, supra, 740 F.2d at 34 (delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake); see also Blankenship v. HEW, 587 F.2d 329, 334 (6th Cir. 1978). After deregulation, EEO is essentially the only remaining means by which the Commission may effectuate the requirement of Section 309 of the Act that it affirmatively determine that grant of a broadcast station renewal, assignment or transfer will serve the public interest. The Cable Act expressly found that "despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries." Pub. L. 102-385, Section 22(a).

In the face of this finding by Congress, the Commission's reluctance to even give a number to EEO reform proposals by respected national organizations is difficult to understand at best, unseemly at worst.

Civil rights organizations have been enormously patient with the Commission's mishandling of their rulemaking petitions. Yet minority interests frequently experience the Commission's failure to routinely stamp in their petitions for rulemaking. The NAACP and UCC proposals bring to five the number of pocket-vetoed minority interest proposals still awaiting "RM" numbers.<sup>10/</sup> In this instance, for the first time, the Commission has expressly refused, in writing, to assign "RM" numbers.

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<sup>10/</sup> The other rulemaking petition pocket-veto victims are:

(a) Petition for Rulemaking of the Coalition to Improve Tax Certificate Policies (filed June 23, 1992). This pro-minority ownership rulemaking petition was filed by a former General Counsel of the National Association of Broadcasters for several minority broadcasters, including Broadcast Capital Fund, Inc., Black Entertainment Television, Inc., Granite Broadcasting Corporation, and U.S. Radio, L.P., along with the National Association of Media Brokers.

(b) Petition for Rulemaking on Minority Ownership of Broadcast Facilities, filed September 18, 1990 (not a misprint) by the NAACP, LULAC, NBMC and the National Hispanic Media Coalition ("NHMC"). This petition contains eleven substantive proposals to advance minority ownership in broadcasting and cable television. Two sets of visits by civil rights organization representatives to each commissioner's office, seeking the required RM number, were unavailing.

(c) Petition for Rulemaking on Minority Ownership of Broadcast Facilities, filed by NBMC November 22, 1981 (unfortunately, this is again not a misprint.) This extensive Petition contained fourteen proposals to advance minority broadcast station ownership. It still lacks an RM number even after NBMC complained of the absence of the RM number at a February, 1984 en banc Commission hearing. Several subsequent NBMC requests for a file number were also unavailing.

Thus, the Commission's failure to assign "RM" numbers here cannot be attributed to accident or inadvertent error. It is, instead, a deliberate attempt to deny procedural due process to minorities.<sup>11/</sup> It is regrettable that the NAACP and UCC must call this to the Commission's attention; see Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969). On reconsideration, the Commission should recognize the inappropriateness of its actions and reverse them by assigning the NAACP and UCC proposals their required "RM" numbers.

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<sup>11/</sup> Even when the Commission does assign an "RM" number, its speed and diligence in processing minority advancement proposals continues to be glacial. An example is provided by Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 3192 (Gen. Counsel, 1992) (revising comment dates). In a proceeding aimed at revising the substantive weights of comparative factors in new broadcast licensing hearings, the Commission promptly and favorably considered a petition for rulemaking filed by nonminorities seeking to dilute the minority ownership policies which Congress had forbidden the Commission to reevaluate or diminish. However, the Commission completely ignored a mutually exclusive proposal filed by the NAACP, LULAC and NBMC, seeking stronger minority incentives. When the civil rights organizations complained, the Commission allowed just one additional week for public comment. Id. (acknowledging that "while the [nonminority] proposal was assigned a Rule Making number, the proposal of NAACP et al. inadvertently was not.") Yet the Commission still did not -- as it had done for the nonminority petition -- include in its order soliciting comments what the civil rights organizations' petition for rulemaking was about or what its merits might be. Id.

(fn. 11 continued on p. 18)

### CONCLUSION

For the reasons provided above, the National Association for the Advancement of Colored People and the Office of Communication of the United Church of Christ respectfully request reconsideration of the Report and Order.

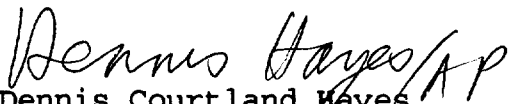
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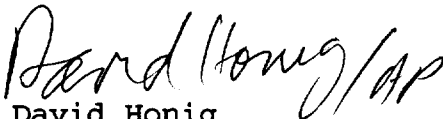
11/ (continued from p. 17)

Another example is provided by the NAACP Petition for Rulemaking on the Use of Beepers in the Drug Trade (RM-6619, filed November 3, 1988). Few things should be as noncontroversial as a proposal to require that parents or guardians take responsibility for their children's beepers. In ghettos and barrios, non-parentally supervised beeper use among children is commonplace. Drug dealers hire children to make crack and heroin deliveries, using beepers to signal when to make drops and deliveries. The NAACP's Petition languished for weeks without an RM number until the Commission's Secretary, in the company of one of the undersigned counsel, physically removed it from a staff attorney's desk and stamped it in. The beeper industry trade organization opposed the petition. It has gathered dust for nearly five years without even a preliminary ruling. It is now apparently the oldest RM-numbered petition still awaiting even preliminary Commission action.

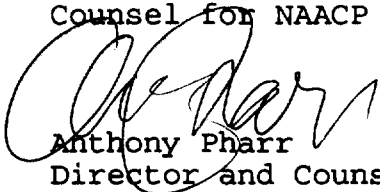
Yet another example is provided by NABOB's November, 1981 Petition for Rulemaking on Minority Ownership. This petition by the nation's largest organization of minority owned broadcasters sought, inter alia, an expansion of the Commission's minority ownership distress sale policy. See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978). Although no party opposed NABOB's Petition, it was still allowed to languish for five years. It was finally dismissed in 1986 because of the staleness of the record and because the FCC suspended the distress sale policy. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (distress sale policy found not to offend equal protection).

Respectfully submitted, <sup>12/</sup>

  
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